No. 81

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

MIDDLE WEST CONSTRUCTION, INCORPORATED,
Petitioner

v.

THE METROPOLITAN DISTRICT,
Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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STATEMENT

This action was brought by the petitioner for extra compensation in connection with a contract entered into with the respondent for the construction of a section of an intercepting sewer in the City of Hartford running from Albany Avenue on the North to Farmington Avenue on the South where it joined another section being constructed under another contract. The contract covered the construction of 6527 feet of sewer in the valley of the Park River which it crossed at four different points. The contract was entered into under date of June 16, 1937 as a result of public bidding, wherein the petitioner was the lowest bidder in accordance with unit item prices listed in the contract. The total cost of said sewer figured on these prices came to $136,639.93. The bids were made upon the basis of a printed document setting forth information for bidders and the proposed form of contract with specifications (Ex. A) which was supplemented by four blueprints incorporated in the contract by reference (Exs. B, C, D and E). These documents taken together became the contract and specifications under which the work was to be done.

The petitioner's complaint upon which the original action was brought contained fifteen claims for compensation over and above the amount of the bid on which the contract was awarded but it has now dropped claim No. 13. There was also an additional claim for refund of the amount deducted from the contract price by the respondent as liquidated damages for failure to complete the work by the date fixed in the contract after certain allowances had been made for days upon which the work could not be pursued.

The petitioner claims added compensation for the construction of what is known as a preformed or precast concrete cradle required by the respondent's engineer to be used in certain parts of the work to support the weight of the sewer pipe where the ground conditions were such that it could not otherwise be properly supported. A claim is made for the cost of pumping ground water as the construction of the sewer progressed because of the fact that there was no outlet from the sewer under

construction to a sewer being constructed southerly to which connection was eventually to be made. The other claims were for extra compensation because of the alleged added cost to the petitioner of removing or avoiding certain underground structures which it claimed were not properly shown upon the blueprints which were a part of the contract; for extra stone which the petitioner alleged was necessary in the construction of the work; for testing some of the river crossings which it alleged the respondent's engineer did not require it to test when the work on each crossing was completed; for relaying a private drain which was not shown upon the blueprints; for additional sheeting to support the sewer trench; for additional reinforcing steel in certain parts of the sewer structure; for building a bulkhead in an existing 27 inch sewer and for removing the lower half of said existing sewer and reconstructing said sewer so as to avoid the new construction; for pumping the sewage from a private house sewer which it claimed was not shown upon the blueprints; for laying a temporary line to divert sewage from an existing sewer to the river; for what the petitioner alleged was a tunnel under certain trees of a kind not called for by the contract and for what it alleged to be a special concrete foundation under certain portions of the sewer pipe not covered by the contract. The petitioner also made a claim totalling $14,205.13 for what it claims was the extra cost to it of work made necessary during the winter months because of the other claimed extras which prolonged the construction of the sewer beyond the period when it would otherwise have been completed.

The respondent under the provisions of the contract retained, out of the amount which would otherwise have been payable to the petitioner under the contract provisions, the sum of $3540 as liquidated damages for the failure of the petitioner to complete the work within the time limited by the contract after certain allowances had been made for bad weather and other circumstances. The petitioner claims that all of this amount should be paid to it on the ground that the delays were due to the acts of the respondent and were not due to any fault on the part of the petitioner.

The petitioner made no claim for extra compensation of any kind until February 5, 1938 when the contract was largely completed and it filed no itemized statement of its claim until late in the year 1938, long after the contract had been actually completed. At no time during the progress of the work did the petitioner claim that any work required by the respondent's engineer was not in accordance with the provisions of the contract except in one instance before the work had been started when the respondent claimed that certain material known as "grout" shown on Exhibits F and G, which were detailed drawings submitted by the respondent's engineer to the petitioner, had not been shown in the original blueprint plans. Any extras which the respondent ordered except in one instance were covered by written instructions from the respondent's engineer and paid for in accordance with the extra cost, all to the satisfaction of the petitioner.

It is the respondent's claim that all of the work done by the petitioner, except that specifically covered by the orders for extras issued by its engineer, was within the provisions of the contract and so accepted by the petitioner without protest of any kind during the construction of the work.

The respondent takes exception to many of the statements made by the petitioner in its petition herein as not being in accordance with the facts as found by the trial court and as not being admitted or undisputed facts as claimed on pages 3 to 19, inclusive, of the petition. The allegations made in the statement of the petition are so detailed and voluminous that it is impossible for the respondent to do more than set forth its own version of the facts in connection with its argument of the case. Throughout the petitioner's statement it has stated as facts certain things which were testified to by its witnesses, one of whom was the president of the corporation, Mr. Ciraci, whose testimony the trial court considered so unreliable that it stated (R. p. 29): "Ciraci's testimony and the claims made throughout on the plaintiff's behalf seemed to me so exaggerated as to border on the reckless and I became convinced I could not accept them with any degree of confidence." Wherever Mr. Ciraci's testimony came in conflict with that of the respondent's wit-

nesses, the trial court accepted the evidence as given on behalf of the respondent.

Although the petitioner has attempted to present its various claims as questions of law arising out of the interpretation of the contract provisions, they must all be considered in the light of the facts found by the trial court on the evidence as presented to it. These facts the trial court has found in favor of the respondent except as to the amount of liquidated damages and has found not proven the claims set forth in paragraphs 7 to 26, inclusive, and 28 to 37, inclusive, of the petitioner's complaint. (R. p. 46)

ARGUMENT

REASONS RELIED UPON BY THE PETITIONER FOR THE ALLOWANCE OF THE WRIT

The petitioner has alleged as reasons for the allowance of the writ that the decisions of the trial court and of the Circuit Court of Appeals affirming the trial court's decision are not in accordance with the principles and applicable decisions of this honorable court; that they probably conflict with the applicable decisions of other United States Circuit Courts of Appeal; that they probably conflict with the principles and applicable decisions of the highest courts of other states constituting the weight of authority or the better reasoned cases, and that the case presents questions of the first importance relating to the construction and interpretation of municipal and private building contracts containing clauses such as the ones in the instant case.

An examination of the cases cited in the petition and in the petitioner's brief will show that in every instance the court found in favor of the prevailing party the facts upon which it based its decision. The principles of law set forth in the cases cited by the petitioner must therefore be applied to the findings of fact made by the trial court and accepted by the Circuit Court of Appeals as required by F.R.C.P. Rule 52, 28 U.S.C.A. following section 723 c. This observation holds true

not only of the Connecticut cases cited but also of the citations of the decisions of this honorable court. In no instance will it be found, we believe, that either the trial court or the Circuit Court of Appeals decided the issues presented to it contrary to the weight of authority and particularly to the decisions of the Connecticut courts and of this honorable court. It would make this brief unduly lengthy to attempt to analyze each one of the cases cited. It is particularly significant that the decision of the Circuit Court of Appeals in the instant case differentiates the case of Montrose Contracting Co. *v.* Westchester County, 94 Fed. (2d) 580, which was decided by it in 1937. Judge Swan, who wrote the opinion in the instant case, was one of the judges who heard the Montrose case.

As to the petitioner's statement that the instant case presents questions of the first importance relating to the construction of building conracts, the respondent submits that all of the questions of law presented in this case have already been passed upon by this honorable court and, as stated above, there is no conflict between those decisions and that in the instant case.

PETITIONER'S SPECIFICATIONS OF ERRORS

The petitioner has assigned thirty-three errors in its petition and, by reference, all of the 210 assignments of errors upon which it relied in its appeal to the Circuit Court of Appeals. It is not feasible to discuss these specifications of error in any detail within the limits of this brief and the respondent believes that it will be more helpful to the court to discuss the petitioner's claims in order and to cover so far as possible in the discussion of each claim the specifications of error made with regard to that particular claim.

PROVISIONS OF CONTRACT AS TO EXTRAS.

Before discussing the petitioner's claims in detail, the contract provisions applicable to extra work thereunder require

consideration. It is the respondent's contention that all the claims made by the petitioner are to be determined by these contract provisions unless they were modified either by a new agreement between the parties or by a waiver on the part of the respondent.

The contract, known as No. 18, appears as Exhibit A. The provisions relating to extra work are set forth on pages 21 and 22 under paragraph D, entitled "Changes and Extra Work." They specify that the respondent's engineer may, in writing, order changes in the work and that no claim for payment, in addition to the amount awarded for such extra work, will be considered unless the contractor shall make such claim in writing within certain definite specified periods. The filing of a claim in accordance with the requirements of said paragraph is a condition precedent to the right of the contractor to receive additional compensation. No contention is made by the petitioner that it complied with the provisions cited and there is no evidence to that effect. The trial court has specifically found that these provisions were not complied with. (R. pp. 27, 30.)

Provisions similar to those contained in paragraph D of the contract as to the method of handling extras have been passed upon in numerous instances by the courts, and it seems to be well settled that they are valid and binding upon the parties in the absence of a waiver, modification or abrogation thereof.

O'Keefe *v.* St. Francis's Church, 59 Conn. 551, pp. 560 and 561;
66 A. L. R. Annotation pp. 651, 652.

It is undoubtedly also well settled that such a provision can be waived by parol, but the evidence of such waiver must be clear and of a most satisfactory character.

O'Keefe *v.* St. Francis's Church supra;
Sanford & Brooks *v.* United States, 267 U. S. 455, 457;
Caldwell *v.* Schmulbach, 175 Fed. 429;
Reilly Company *v.* Smith, 177 Fed. 168.

The petitioner sought to escape the application of the provisions of paragraph D by asserting that its president, Mr.

Ciraci, claimed orally to the respondent's engineer that the various items for which it now claims extra compensation were in fact extras and that the respondent's engineer orally promised that if they were extras they would be paid for as such upon the completion of the work. (Testimony pp. 482, 483) There was a sharp conflict in testimony between Mr. Ciraci, testifying for the petitioner, and Mr. Brewer, testifying for the respondent, as to what took place in that connection. (Testimony pp. 869, 870, 871, 888, 884) The trial court has found in favor of respondent as to this fact. (R. pp. 28, 46)

That the respondent followed out the provisions of this paragraph in ordering extra work done by the contractor is indicated by the fact that in at least four instances, where the respondent recognized that it was calling upon the contractor to do work not covered under the contract, it wrote letters to the contractor specifying exactly what work was to be done and exactly how the contractor was to be compensated for that work. (Testimony pp. 885-888) These letters appear as Exhibits 5, 6, 7 and 8 and range in dates from August 12, 1937 to May 7, 1938. In one instance at least (Exhibit 7) the contractor was requested to name a definite price for the work and was ordered to do it in accordance with that price. Mr. Brewer, the respondent's engineer in charge of the work, stated (Testimony, p. 885) that one other order for an extra was given orally to the petitioner because it was a small matter and had to be done quickly. Confirmation by letter was apparently overlooked. But with that one exception all work recognized by the respondent's engineers as extra work was covered by a written order under which the work was done by the petitioner. Mr. Buck, testifying for the petitioner, stated that it was good engineering practice to order extras in writing. (Testimony pp. 822, 823)

The petitioner sought to discount the importance of these written orders for extras on the ground that they were all small matters involving no large amounts of money. That is probably true but they serve to substantiate the respondent's contention that even in the case of such small extras it rigidly adhered to the provisions of the contract as to written orders.

Surely, its engineers would not have been so meticulous in small matters and have obligated the respondent to any such substantial payments as the petitioner now seeks on construction work, which, according to the petitioner's claims, made the contract an entirely different one from that into which the parties entered.

Mr. Kilby, one of respondent's inspectors, testified that, where an extra is ordered, the inspector on the job is required to check the time and materials which go into that extra and compare the results with the petitioner's foreman, to be sure that they are in agreement on the details so that there will be no dispute when the time comes for payment. (Testimony pp. 1099, 1100) This was done even on all of the extras which involved comparatively small amounts and on any such substantial claims as those presented here the respondent's inspectors would have been extremely careful to check labor and materials in detail as the work was going on. They did keep a daily record on every part of the work as to just what was done, but they had no opportunity to compare that record as to any item of petitioner's alleged extras with the petitioner's foreman, and the petitioner sought to have the trial court disregard the evidence of the respondent's records and take the unrecorded recollection of Mr. Ciraci in its place. The petitioner did not and cannot dispute the accuracy of those records, which were made in the regular course of work and not in contemplation of any law suit, but it contended that the costs of various parts of the work, claimed to be extras, which the respondent prepared from these records do not show the real cost of these items to the petitioner and should not be considered by the trial court.

Although the plaintiff notified the respondent in its letter of February 5, 1938 (Exhibit EE) that it intended to make a claim for extras, it was not until ten months later, in December of that year, that the detailed claim was filed. (Ex. 13; Testimony pp. 964-966) The petitioner attempted to make some point of fact that the respondent did not ask for an itemized statement. Certainly, if the petitioner filed the itemized statement as soon as it could, as stated in its letter (Ex. EE), it

would have done the respondent no good to have made a request for it at any earlier time, as it could not have been produced. More than that, all of the work covered by the claim, except the comparatively little which was done after February 5, 1938, had been completed and it would have been impossible for the respondent to have secured any more information than it had from its own records as to the details of such work. In preparing this itemized claim the petitioner brought in an outside engineer, Mr. Buck, who knew nothing whatever about the job itself, because it had been entirely completed at the time his services were obtained, and he himself testified he made the claim up from such records as the petitioner gave him and also from Mr. Ciraci's recollection of what occurred. (Testimony, pp. 782, 795, 796, 814) In other words, it was a statement made up from sources of information that could not be verified by the respondent by physical examination of those sources as the one day-by-day record alleged to have been kept by the petitioner was Mr. Ciraci's diary, the greater part of which was never produced for the inspection of the trial court or the respondent. (Testimony pp. 292-294) At best, Mr. Buck could make up the details of the claim only from what was told him so that he acted not as a consulting engineer but as a cost analyst. The court's attention is directed to the fact that the original itemized claim (Ex. 13) and the testimony of Mr. Ciraci, reduced to writing as Exhibit H, while purporting to cover exactly the same claims, do not agree in their figures, and the claims now made are in the aggregate substantially above what were originally presented to the respondent as Exhibit 13 totals only $56,202.92 as against $68,632.22 shown by Exhibit H. Mr. Buck testified that Exhibit H was not his computation but an attempt on his part to put on paper what Mr. Ciraci in effect dictated to him. He acted merely as Mr. Ciraci's clerical assistant in that regard. (Testimony p. 783)

Certainly the testimony of Mr. Ciraci, flatly contradicted as it was by that of Mr. Brewer and negatived also by the actual practice adhered to by respondent's engineer in ordering extras in writing, was insufficient to prove the alleged waiver

of this provision by the respondent. And no act of any of the respondent's representatives was testified to which would strengthen the petitioner's contention in this regard.

The finding of the trial court, that the condition precedent to the presenting of claims for extras has not been complied with and that the requirements of the contract were not waived by the respondent, is strongly supported by the evidence.

CLAIM NO. 1. PREFORMED CRADLE.

One of the largest of the petitioner's claims is based on what has been called preformed cradle construction, which was ordered by the respondent's engineer in four sections of the work. The purpose of this construction, as testified by the respondent's engineer, was to prevent the heavy sewer pipe from sinking into the soft ground and, according to his testimoney, it was contemplated at the time the contract was let that this type of construction might have to be used. (Testimony, pp. 874, 875, 939, 942, 950) The petitioner's contention seems to be that nowhere in the contract or specifications or accompanying plans was the type of construction known as preformed cradle described and that it had no notice that this type of construction would be used.

On the contract plan, Exhibit C, appear cross-sections of all three types of reinforced concrete pipe construction known as type A, type B-1, type B-2 and type C. It is the claim of the respondent that the type of construction known as preformed cradle is type C as delineated on this plan, and, although this type of construction is not described in detail in the contract specifications, those specifications, (Ex. A, p. 40, par. 2) provide that plans, proposal, contract and specifications are intended to be cooperative, and all works necessary to the completion of the contract shown on plans but not described therein, and all works described therein but not shown on the plans are to be considered as having been properly described. The plan referred to indicates that type C is an entirely different type of construction from either type A or types B-1

and B-2. It is evident even to a layman that no planks and sills are shown in type C and that the indication is of some formed foundation on which the sewer pipe rests. The respondent contends that this concrete foundation cannot be installed unless it is preformed, that is, unless it is allowed to assume a permanent shape and to acquire some strength by waiting before the pipe is placed on it, a process which is known as curing. It is the further contention of the respondent that this cradle must be preformed if reinforcing steel is used, as it was, because otherwise the steel could not be placed in its proper position on account of the sills. It is the respondent's contention that type C construction could be ordered with or without a pile foundation underneath and, in fact, no such pile foundation was ordered in any section of the work. The respondent's engineer testified that this was a much stronger type of construction than either type A or type B and was indicated in this particular contract wherever the ground was of such a nature as to be so soft or unstable as not to support the weight of the sewer pipe until the concrete had set sufficiently to spread the load upon the bottom of the trench and prevent undue settlement. (Testimony pp. 874, 875, 951) It was, in fact, ordered in one section after type B construction failed to hold the weight of the pipe, which sank below grade. (Testimony, pp. 874, 944, 1083, 1084, 1117)

Mr. Ciraci testified that he had never seen this type of construction before (Testimony p. 459) and from this it would appear that his failure to understand how this foundation was to be constructed, as provided by the contract, was due to lack of acquaintance with this type of construction and that he was not justified in assuming that it was to be installed in the way that he claims the plans indicated. As the petitioner's sewer operations had been confined largely to Ohio except for one contract in Pennsylvania, Mr. Ciraci's lack of knowledge was understandable.

The contract plans, of which Exhibit C is a part, were made available to all parties, including the petitioner, before the contract was let. Before the petitioner actually began operations under the contract, the respondent's engineer sub-

mitted to Mr. Ciraci a blue print showing the details of this cradle, dated June 30, 1937 and in evidence in this case as Exhibit F. (Testimony p. 870) These details differ in no respect from the section shown on Exhibit C except that there is a notation that ½" between the bed of the cradle and the outer surface of the sewer pipe is to be grouted. Although Mr. Ciraci testified that he had told Mr. Brewer, the respondent's engineer, that the entire preformed cradle construction was outside the contract provisions, Mr. Brewer testified that the only objection Mr. Ciraci ever made to this type of construction was this grouting which Mr. Ciraci pointed out had not been definitely shown on Exhibit C and concerning which he was not informed until Exhibit F was presented to him. (Testimony p. 870) Realizing that this might prove to be an added expense to the petitioner, Mr. Brewer included in the final estimate for the work an amount to cover the cost of the concrete used in this grouting, as he had in earlier contracts. (Testimony, pp. 871, 884) The petitioner, recognizing that the claim on this item is a very substantial one to be made without having a written order to support it, sought to bolster its claim that it was ordered as an extra by the respondent, by stating that the detailed blueprint sketches hereinabove referred to, and which were delivered to Mr. Ciraci before any cradle work was done, were in fact orders in writing which satisfied the requirements of the contract in that regard.

The decisions hold that, *where an extra is ordered,* a detailed blueprint such as these in question may take the place of a written order.

See 66 A. L. R. Ann. p. 660, par. b.

Such blueprints are never to be construed to be orders in writing where the owner or his representative did not give them with that intention. In other words, if they were given, as the respondent in this case contends, as illustrative of contract drawings already made and in the possession of the petitioner, it would be twisting the facts beyond reason to hold that such blueprints were orders for extra work. Their similarity to the original contract blueprints is such that they cannot fairly be

construed as written orders for extra work and the trial court was of that opinion. (R. p. 30)

The contract, Exhibit A, specifically provides, on page 31 under paragraph P, that the general features of the work are shown on the drawings referred to in the proposal which are made a part of the contract and the respondent's manager under that provision has the right and duty to furnish the contractor with such additional plans as may be necessary to show the details of construction which may be considered as illustrating the requirements set forth in the contract and specifications. While undoubtedly the respondent could not require the petitioner to do work shown on additional plans prepared by its engineers which bore no relation to the original plans and specifications, nevertheless the details of the concrete cradle shown on Exhibit F certainly do not vary in any major particular from the drawing shown on Exhibit C. As a matter of fact, the grout seems to be the only additional feature aside from the indication of the dimensions of cradle itself to be used in connection with the various sizes of sewer pipe. The plan (Ex. C) provided that dimensions of cradle would be as designated by the engineer. Exhibit D, another sheet of the contract plans, shows this same type C construction where the pipe is placed on, or very nearly on, the surface of the ground. The cradle in such instances would have to be preformed, as it rests on the surface of the ground with no trench. (R. p. 32; Testimony p. 882)

Mr. Brewer, the engineer in charge of this work for the respondent, testified that this same type of preformed cradle construction had been used in contract No. 2 in 1934 and in contracts Nos. 11 and 14 in 1935. (Testimony, p. 872) These contracts were parts of the same sewerage project as the present contract No. 18. Mr. Brewer further testified that in none of these contracts had there been any claim of the contractor that this type of construction involved extra payment. (Testimony, p. 872) In the case of the present sewer, Mr. Brewer testified, the respondent's engineers expected, because of its location in the river valley, to have to use this type of construction, although they could not tell in advance exactly

how long the sections would have to be in the various locations. The borings shown on the contract plans (Exhibit B) indicated in several places "sandy loam", "ash fill", "fine sand" and "soft clay". It would naturally be impossible to tell until the trench was opened up to some extent or test pits dug how unstable the bottom would be and whether or not type C construction would be needed. (Testimony pp. 881-883) This the petitioner must have known would be the situation when the contract was let. As a matter of actual fact, the respondent's witnesses testified that south of crossing No. 3 over the Clark property, between crossings Nos. 1 and 2 on the Seminary property and north of crossing No. 2 on the Jacobus property, orders for type C were given at the very start of such sections. (Testimony p. 883) And Exhibit D, as stated above, shows that this construction was *not* an afterthought.

It did not appear that the method of constructing the preformed cradle ordered by the respondent differed in any material respect from type C as indicated on the drawings and the petitioner's chief complaint was that there was an unnecessary delay in the time required for curing the concrete. It is alleged in the complaint that the respondent required the preformed cradle to be cured for a period of from three to seven days before the sewer pipe could be laid upon it, and Mr. Ciraci testified that as many as seven days were required in several instances. With the purpose of meeting the petitioner's testimony in this regard the respondent prepared, from day to day diaries kept by its inspectors, a chart showing the periods of the pouring of the cradle and the laying of the pipes covering the entire sewer construction work. In addition to this chart, which appears as Exhibit 14, excerpts have been made from the diaries mentioned covering every foot of the preformed concrete cradle work done on the job. These appear as one exhibit, No. 24, and from this exhibit it can be fairly easily determined that in no instance did a period of as much as seven days elapse in any part of the work between the pouring of the cradle and the laying of the pipe, except where weather conditions, holidays, Sundays, etc. intervened. The average is certainly not more than four days and in many in-

stances less, even in the summertime when high-early cement was not used. (Testimony of Mr. Kilby, pp. 1072-1082)

The diaries kept by the respondent's inspectors are very complete and indicate for each day of the contract period exactly what was going on. It does not appear from these diaries that there were any idle days, except as a result of weather conditions (See Ex. 30), and it would seem, therefore, that the petitioner's men were otherwise employed during the period when the cradle was curing. No diary was kept by Mr. Ciraci or by anyone on behalf of the petitioner indicating day by day exactly what was being done by the various gangs of workmen. Mr. Ciraci was drawing entirely upon his memory as to how long a time elapsed between the pouring of the cradle and the laying of the pipe on it, and such testimony is certainly not dependable in view of the exact evidence which the respondent produced showing the progress of the work day by day.

The trial court has accepted the testimony of respondent's witnesses as to what took place with regard to the preformed cradle work, has found the petitioner's testimony in that regard unsatisfactory and has definitely found the item of claim unproven. (R. pp. 35, 46) This finding is supported by substantial evidence, as indicated in the foregoing discussion of what was before the trial court.

CLAIM NO. 2. EXTRA PUMPING

This is a claim for extra expense incurred by petitioner due to the necessity of pumping ground water as the construction of the sewer progressed. This claim is based on the alleged fact that the plans (Exhibit B) erroneously showed an existing sewer at the lower end of contract No. 18, and the petitioner, in making up its bid, contemplated that it would be allowed to connect with the sewer shown so that the ground water would flow away through the completed pipe. The plan in question shows, south of Farmington Avenue at the southerly end of the sewer to be constructed under contract 18, two

parallel broken lines with no designation whatever as to what they represent. Mr. Ciraci, acting for the petitioner, had a set of plans and testified that he examined the site of the work before he prepared his bid. (Testimony, pp. 328, 329) He made no inquiries whatever of any representative of the respondent as to whether there was an existing sewer at that point, (Testimony p. 365) although he knew, and in fact it was stated on page 40 of Exhibit A, that the work to be done under contract 18 was but a part of a larger project, and that the contractor must cooperate with other contractors for other parts where the work provided for in contract 18 adjoined other work. If it was so important to the petitioner to have this supposed existing sewer as an outlet, it was incumbent upon Mr. Ciraci to make certain that it was in fact in existence and not make an assumption which was entirely unwarranted from the information which he had.

It appeared from the testimony of Mr. Brewer that in fact the intercepting sewer referred to was not in existence but was under construction as a part of contract No. 16, which was let about two months before contract No. 18 and which could not possibly have been completed until many weeks after the petitioner began its work, as No. 16 started about a mile south of No. 18. The completion date for No. 16 was December 1, 1937 and that for No. 18, December 31, 1937. (Testimony p. 861) If Mr. Ciraci had looked further on Exhibit B he would have noted in the upper left hand corner, in the detailed section, a line labelled, "Beginning of this contract Sta. 49+89.00, End of contract 16." It would have taken very little effort on his part to have ascertained before he prepared his bid that he would have no outlet at the southerly end of his contract for the drainage of ground water. He did in fact know as early as May 26th, the day after bids were filed, before he left Hartford to go to Cleveland and before the award was made, that there was no outlet, and yet in his letter of May 29th, written to the respondent from Cleveland, in which he was required to give an outline of his schedule of operations under the contract, appears no statement that the petitioner would have to change its plan because of the

absence of the outlet which Mr. Ciraci now claims was shown on the contract drawings. (Testimony, pp. 372, 384, 385, 386) Moreover, Mr. Brewer, testified that even if the supposed sewer had been completed, the petitioner would not have been allowed to connect up to it and pass the ground water through it, as it would have been in use for sewage purposes and would have created a foul condition. (Testimony p. 890) Mr. Brewer also testified that the grade of the sewer being built by the petitioner was so flat that ground water would not have been drained rapidly enough through it into No. 16 to have been of any use to the petitioner. (Testimony p. 889) Even if the sewer outlet had been in existence, petitioner would have had to find out about its size and height or it would have been of no advantage to its work. (Testimony p. 916)

There is certainly nothing in the contract justifying the petitioner in its belief, and the respondent contends that this claim is entirely untenable. Indeed, the contract provides (Ex. A, page 50, paragraph 29) that the contractor shall provide all necessary pumps for excluding and removing water from trenches, tunnels and other parts of the work, and he shall satisfactorily remove the water. Compensation for such pumping was to be considered as included in the prices stipulated for the appropriate items as set forth in the paragraph mentioned and also in paragraph N (3) on page 28. Ample notice was, therefore, given to the petitioner of what it was required to do in the way of taking care of ground water. Mr. Brewer stated that the petitioner did only the normal amount of pumping of ground water for such a job as this. (Testimony, pp. 921, 922, 936-938)

CLAIM NO. 3. UNDERGROUND STRUCTURES IN WOODSIDE CIRCLE AND REPAVEMENT OF STREET.

The petitioner has made claims for extra compensation because it encountered various structures beneath the surface of the ground in and near Woodside Circle north of Asylum Avenue. These were: (1) a gas pipe which, while shown on

the plans, the petitioner claims was not located in the position indicated; (2) the stone foundation of an old house which was not shown on the plans because its existence was unknown to either of the parties; and (3) a water main which, while shown on the plans as crossing the line of the sewer trench, the petitioner claims was found in a different location and one which necessitated the digging of a wider trench and supporting the water pipe.

Underground structures in general are covered by the provisions of the contract. On page 28 of Exhibit A under subparagraph (3) of paragraph N, it is stated that the bid prices include full compensation for removing or protecting without cost to the District all pipes, mains, drains, sewers, conduits or other obstacles whether shown on the plans or not. And, again, on page 49 appears the provision that the contractor shall without expense to the District do everything necessary to support, protect and maintain all pipes, conduits, sewers, drains or fixtures of all kinds lawfully in the line of excavation or adjacent thereto or other structures which may be damaged by the work to be done under the contract. Furthermore, the plan (Ex. C) bears a note as follows: "The indication of pipes, soils and underground objects hereon are supposed to be approximately correct, but, should they be found otherwise, the contractor shall have no claim on that account, it being expressly understood that the party of the first part does not warrant the plot to be even approximately correct." Apart from the contract provisions and the notation quoted, it appeared from the evidence that the gas pipe was found in approximately the location indicated on the plan (Ex. C). (Testimony, pp. 957, 1019) An examination of the plan shows that the gas pipe, which appears just southerly of station 81+02.65, is within the limits of the sewer trench, for the broken lines designated on the plan as 6" gas are practically in the same line as the outer surface of the sewer pipe indicated on the plans and, of course, the trench had to be excavated wider than the diameter of the pipe, which would bring the gas pipe within the sewer trench. The evidence shows that this pipe, instead of being on the easterly side of the trench,

was actually on the westerly side and the petitioner made a request, to which the respondent acceded by a letter dated December 3, 1937 (Ex. 19), as the result of which the line of the sewer was moved one foot nearer the easterly curb of Woodside Circle so as to make this work easier for the petitioner. (Ex. 19; Testimony, pp. 1002, 1003) At that time no request was made by the petitioner for extra compensation and no written order was issued by the respondent that the work was to be done as an extra. It appeared in evidence that the information shown on the plans had been obtained by the respondent's engineer from the Hartford Gas Company, owner of the pipe, and was the best information obtainable from any source. The respondent itself had no independent knowledge as to the location of the gas pipe. (Testimony, p. 897) In view of the contract provisions and the pertinent facts as to the location of the gas main, this claim of the petitioner would seem to be entirely unfounded.

The existence of the old stone house foundation as encountered by the petitioner was entirely unknown to both parties, and, so far as appeared from the evidence, could not have been ascertained in advance by either of them. The provisions of the contract cited fully covered this situation, and the petitioner at the time of signing the contract was apparently entirely willing to accept its conditions. If, therefore, it is allowed to recover extra compensation for the removal of this foundation, the burden is shifted from the petitioner, which assumed it, to the respondent municipal corporation which sought to protect its taxpayers against just such a contingency.

The water main, for the support of which the petitioner claims extra compensation, is shown on the plan (Ex. C) crossing the line of the sewer on Woodside Circle approximately west of the house marked 24 on the plan. The complaint of the petitioner seems to be that, although it expected to encounter this water main in its excavation work, the pipe actually continued within the limits of the trench for a greater distance than the plans showed. The respondent submits that on plans of this kind accuracy to the last detail in such a mat-

ter as this is not feasible, and the petitioner should have made allowances, in submitting its bid, for such a contingency as this. As a matter of fact one of the respondent's engineers testified that, although he did not see the pipe in the trench, he was familiar with the work that had been done in supporting this pipe and was satisfied that not more than thirty-five to fifty feet of the pipe were within the limits of the trench and that the supports used had been paid for. (Testimony, pp. 1003, 1004) Part of the petitioner's claim is the cost of this support in spite of the fact that the provisions of the contract on page 49 require this as a part of the bid price.

A further claim appearing in Exhibit H is for extra compensation for the construction of concrete foundations under existing sewer pipes at the northerly end of Woodside Circle. This situation is also covered by paragraph 28 appearing on page 49 of the contract, and the petitioner admits this but claims that the item under which the foundations were paid for could not be interpreted to cover formed concrete of the kind used in these supports. Mr. Ciraci testified that the foundation piers used to support pipes in this way must be prepared by the use of forms and that the total amount of concrete used was paid for. (Testimony, pp. 492-494) The forms were not to be paid for separately and it would seem that this claim has no basis in fact.

The respondent submits that none of the above extra should be allowed under all the circumstances and for the further reason that the petitioner at no time made any claim in writing to the respondent at the time the work was done. If they constituted extras under the contract, the contract provisions covering them should have been complied with by it.

In the case of *Tompkins, Inc. v. Bridgeport*, 100 Conn. 147, the blueprint furnished to the contractor purported to indicate the existence of all sewers, pipes and other structures under the earth surface which might affect the carrying out of the work and the location and extent and condition of certain sewers. It further appeared that twenty completed pipes and other structures not shown on the blueprint existed

and affected the carrying out of the work. The court said, on pages 153-154:

> "The Exhibit (referring to the blueprint) may fairly be taken to be an authoritative representation by the defendant city as to the existence and location of its own public sewers. It does not, however, purport to be an authoritative representation as to the existence, or nonexistence, or location, of any other underground structures which might affect the progress of the work. As to such structures the contractors were informed by the Exhibit that the city assumed no responsibility for errors in location. * * * * * The net result is that it appears from the complaint that the Exhibit—as far as it purported to be authoritative—was in the main correct, but was misleading in that some public sewers encountered in the progress of the work were not shown, and in that one sewer marked 'dead' had flow in it." (parenthetical phrase supplied)

The municipality was not held responsible for the location of underground structures with the placing of which it had nothing to do.

The petitioner claims that the respondent required it to repave certain portions of Woodside Circle from curb to curb, although the plans and specifications indicated that the petitioner should renew only such portions of the pavement as were damaged by the sewer operations. Here again the contract (Ex. A) provides fully for the repair of street pavement. On page 29 in paragraph N (3) the bid prices are to include full compensation "for replacing, repairing and maintaining the surface of the street or private land if affected by work performed under this contract." On page 52 of the contract, in paragraph 38, it is provided that the contractor must conform to the customs and requirements of the state, town or city highway or street department as to making cuts in and repairs to such pavements. And in the same paragraph, on page 53, the contractor is required, when the fill has settled and before the end of the maintenance period, to repair permanently in a manner satisfactory to the engineer and to the proper state, town or city official, and restore to a condition as nearly like as possible to the condition of the roadway before the sewer

work was started all cuts and settled or damaged areas in pavements, sidewalks, curbs, gutter and street fixtures occasioned by work under the contract. And the contract is not to be considered as completed until repairs and restoration of damages have been permanently completed.

The respondent's evidence showed that throughout most of the length of the Woodside Circle the area where settlement had taken place and where new pavement was required to be installed by the petitioner included a strip from the easterly curb to the center of the street but that no greater area than necessary was required to be repaired and that in no case was the full width of the street resurfaced. It is apparent that, where excavation has been made in a highway, more than the exact area of the trench must be renewed as there is bound to be some settlement at the edges. (Testimony, pp. 999-1001; Exhibits 15, 16, 17)

The photographs introduced in evidence by the respondent (Exhibits 15, 16, 17 and 18) plainly show the portion between the easterly curb and the approximate center of the street which was required to be repaved by the petitioner. In no case do these photographs show that the entire width of the street was repaved. If the petitioner at the time of this repaving considered that it was being required to do extra work under the contract it would have been a very simple matter to have made a written claim for it to the respondent and to have shown by actual photographs just what part of the Woodside Circle pavement had been renewed. There is no foundation for this claim and the trial court has so found.

CLAIM NO. 4. ADDITIONAL STONE FOUNDATION

The petitioner claims that at the four river crossings and at certain other locations it was required to place broken stone in accordance with requirements of the contract (Par. 16, p. 46) and it alleges in certain instances the respondent paid on the basis of a 2″ stone foundation, whereas the petitioner had to put in a 4″ foundation, as the bottom 2 inches worked

into the soil. It will be noted that paragraph 16 referred to provides that whenever the ground encountered is soft and unsuitable for foundation, it shall be removed and replaced by crushed stone, plank or concrete, laid as may be ordered, and that payment for such foundation as placed shall be either per cubic yard of crushed stone or per board foot of lumber, or per cubic yard of concrete actually ordered and used in the trench. The respondent claims that only 2 inches of stone was ordered in trenches and that no more was placed. As to the stone used in the river crossings, the claim set out in Exhibit 13 figures 10′ wide by 6′ 2″ high against 11′ by 5.2′ actually paid for by the respondent.

The amount involved in this claim is small but it would appear that the petitioner is attempting to secure payment for all of the crushed stone used on the job, whereas it was required to use such material in roadways and other places in the construction of the job, which was not to be paid for by the respondent as a specific item. (Testimony, pp. 1008, 1009)

CLAIM NO. 5. TESTING RIVER CROSSINGS.

It was admitted by all the witnesses that the leakage tests should have been made when the river crossings were completed and before the sheeting had been drawn and the work backfilled and the river allowed to flow over the pipe. (Testimony, pp. 779, 896, 1132) The petitioner claims that it was the fault of the respondent that the leakage tests were not made at the proper time.

There was a sharp conflict of testimony between Mr. Ciraci and the respondent's witnesses, Mr. Root, Mr. Kilby and Mr. Brewer, as to what actually took place with regard to the testing of the river crossings. The No. 4 river crossing was tested when it was completed and no question is raised about that. Mr. Kilby testified that he asked Mr. Ciraci if he was not going to test river crossing No. 3 when it was completed and that Mr. Ciraci told him that Mr. Brewer had said it would not be necessary to test any of the river crossings. Mr. Kilby

then attempted to get in touch with Mr. Brewer without success and later spoke to Mr. Root on the job and asked him if no test of the river crossings was to be required. (Testimony, pp. 1095, 1096, 1034, 1130, 1131) Mr. Root said he had had no instructions from Mr. Brewer not to require a leakage test and so far as his instructions went the provisions of the contract were to be enforced. (Testimony, p. 1034) Mr. Ciraci, however, completed river crossings Nos. 1, 2 and 3, backfilled the same and withdrew the sheeting without making leakage tests. Later, Mr. Brewer insisted upon such tests and they were carried out, but due to the difficulty of making such tests and stopping leaks from the inside the results were very unsatisfactory and the work long drawn out. (Testimony pp. 895, 896) The petitioner now claims not only that the respondent's engineer and inspectors were responsible for the failure to test at the proper time, but also that the type of construction provided by the specifications was such that the joints could not be made tight as there was bound to be settling which would open up the joints. The petitioner was shortsighted in not testing the crossings upon completion, as, if the tests had been made while the crossings were still dry, there would have been no chance for the pipes to settle and the petitioner would have had a considerable advantage thereby, as, once the crossings had passed the leakage test, it could not have been held responsible for any later leakage. It is practically impossible to detect the location of leaks from the inside of the pipe and to caulk them satisfactorily, as both respondent's engineer and Mr. Buck agreed. (Testimony, pp. 779, 895) This must have been as well known to the petitioner as to the respondent. Even though the last river crossing was completed on November 12, 1937 and the testing of the No. 3 river crossing was not started until March, 1938, one line of pipe in No. 1 crossing passed the test, one line in No. 2 crossing passed the test and No. 3 passed the test complete. (Ex. DD; Testimony, pp. 508-514) This would seem to refute the petitioner's contention that the construction of the river crossings was such that they could not be made reasonably tight and indicates that the result might have been satisfactory on

all lines if the test had been made while the pipes were still uncovered. Even Mr. Ciraci thought so. (Testimony, p. 522) As the petitioner abandoned the work in March 1938, the respondent was compelled to have the crossings made tight by another contractor in accordance with the provisions of the contract. The petitioner has included in its extra claim for this testing not only the charges of the sub-contractor but 15% overhead and profit thereon, as it has in the other instances mentioned.

It seems extremely improbable that the respondent's inspectors on the work would have assumed to dispense with the requirement of the contract for the testing of the river crossings without authorization from the respondent's engineer, and Mr. Brewer has denied that he ever gave instructions to waive such tests. (Testimony, p. 895) Moreover, Mr. Kilby's testimony differs from Mr. Ciraci's, in that the former states that Mr. Ciraci told him that Mr. Brewer had waived the leakage test, whereas, Mr. Ciraci testified that Mr. Kilby waived the leakage test. The trial court has accepted the testimony of respondent's witnesses as to this claim.

CLAIM NO. 6. RELAYING PRIVATE DRAIN.

On the Veeder property, just south of Asylum Street, petitioner encountered a 6″ drain which had apparently been placed underground by the property owner to drain the water from his land. The respondent had no knowledge of the existence of this drain and naturally could not show it on the contract plans. It claims that this drain also, as an underground structure, was covered by the provisions of paragraph N (3) on page 28 of the contract, of paragraph 29 on page 50 and also by the notation made on the contract plans. It appears that no claim for this as an extra was made by the petitioner at any time until it filed Exhibit 13 sometime in December, 1938. As having a bearing on this particular alleged extra, the Court's attention is directed to the petitioner's claim for pumping sewage on the Day property, appearing on page 39 of Exhibit H.

The cost of by-passing that sewer to the river was paid for by respondent as an extra and that extra was covered by a letter from respondent (Exhibit 6) in accordance with the contract. (Testimony, p. 887)

CLAIM NO. 7. ADDITIONAL SHEETING.

Petitioner makes claim for $575 for 115,000 board feet of lumber at the bid price of $5 per thousand, claiming that this was lumber not paid for by the respondent but which could not be taken out with safety to existing structures and that the respondent enjoyed the benefits thereof. The contract provides in paragraph 14 on page 45 that the respondent's engineer will order sheeting and timbering left in the ground when, in his opinion, it may be necessary to protect the work under construction; and, in paragraph 15 on page 46, that when sheeting is ordered left in it shall be placed, cut and removed in such parts and amounts and at such points as the engineer shall order, and that the contractor shall receive as full compensation the price named in the proposal per foot board measure for the lumber actually left in the ground, except that when any sheeting plank is cut as ordered and the end removed is not over 3′ long the whole of said plank shall be paid for. All the sheeting ordered left in was paid for. (Testimony, p. 1006) In Exhibit H, on page 36, it appears that the contractor left in a total of 189,000 board feet of lumber at points where *in his judgment* its removal would endanger the new sewer and adjacent structures and pavements, whereas, the respondent paid for only 73.7 thousand board feet of lumber claiming that the remainder was not ordered to be left in place. The petitioner concedes that the respondent's engineer did not order the extra sheeting left in, but it seeks to substitute its judgment for that of the engineer, in spite of the fact that the contract provides that the engineer shall be the judge. (Testimony, p. 529)

The case of *Tompkins, Inc. v. Bridgeport*, supra, covers this very point of sheeting left in place throughout the work.

In that case the contractor claimed that good engineering practice required all of the sheeting to be left in place throughout the work. The contract provided that when the engineer decided that sheeting or shoring could not be removed without injury to the sewers or adjoining structures it should be cut where designated by the engineer and the upper part removed. The court said, at page 158:

> "The parties expressly agreed on a rule for determining whether the sheathing should be removed or left in place, which rule covered the whole subject-matter. The sheathing was to be removed unless the engineer otherwise decided for cause, and then it was to be left in place. That being the express agreement of the parties, the law will not sweep it aside and substitute an implied agreement to follow a different rule which would, in effect, substitute the judgment of a trier for the judgment of the engineer. The engineer must follow his honest judgment; and there is no allegation that he has not done so."

We have this exact situation in the present case and the respondent submits that its engineer's honest judgment should prevail.

CLAIM NO. 8. ADDITIONAL REINFORCING STEEL.

This is a small item but shows the attitude of the petitioner in attempting to secure payment for all reinforcing steel used by it even though the contract provided that all reinforcing steel should not be paid for separately from the structures of which it was a part. Paragraph 49 on page 56 of the contract provides that all reinforcing steel shown on plans as part of any structure, unless indicated otherwise, is included in the price bid for that structure. The petitioner seeks to nullify this provision by claiming that item 16 on page 81 of the contract requires the respondent to pay for reinforcing steel in all special structures and that this is in conflict with paragraph 49, and that it is therefore entitled to payment for all reinforcing steel used by it. (Testimony, p. 533) The peti-

tioner produced no evidence to show where the steel not paid for was used (Testimony, p. 529) and at no time made claim for the steel as an extra until it filed with the respondent its original claim (Ex. 13) in December 1938. The respondent submits that not only is this claim without foundation but that the petitioner is estopped by its failure to comply with the terms of the contract as to the filing of claims for extras. (Testimony, p. 1006)

CLAIM NO. 9. BUILDING BULKHEAD IN 27″ SEWER AND BREAKING OUT SAID SEWER.

This claim is for extra payment on account of the work which petitioner did in blocking off the existing 27″ sewer where the line of the new sewer joined the line of the old. The 27″ sewer was an active sewer and, as shown on the contract plan (Ex. B) in the upper left-hand corner, would have to be blocked off when the new sewer construction reached the point where it followed the line of the old sewer. The plan referred to shows a bulkhead in the old sewer with a notation "Build 8″ brick bulkhead in the present 27″ sewer". It gives no definite location for this bulkhead but its very evident purpose is to shut off the flow in the old sewer. Mr. Kilby, the respondent's inspector on the job, testified that the proper procedure was for the petitioner to block off the flow in the old sewer by a temporary bulkhead until the new sewer was constructed, when a permanent bulkhead should have been placed in the old sewer. (Testimony, pp. 1089-1095) Apparently the petitioner selected a location in the old sewer for the bulkhead which was too near the line of the new sewer and which had to be broken out when the new sewer was built. The trial court has accepted Mr. Kilby's testimony as to the facts. (R. p. 39)

This claim as to the rebuilding of the bulkhead in the old sewer and the claim as to the breaking out of that same sewer because of its proximity to the new sewer are treated together in petitioner's Exhibit H on page 38. They are, however, separate matters. On the same contract plan (Ex. B), about mid-

way of the plan near the bottom, is shown the elevation plan of the new sewer and the old 27″ sewer. The inside line of the old sewer is shown practically on top of the line of the new sewer, so that the contractor was clearly informed that it would be impracticable to attempt to excavate for the new sewer while the old sewer was in place. Moreover, the original diameter of the new sewer was 51″, but at its own request the petitioner was allowed to substitute brick for concrete in building the new sewer at that point which increased the diameter of the new sewer by several inches and caused further interference with the line of the old sewer. (Testimony, p. 544) The contractor therefore knew that it could not possibly install a new sewer without breaking out the old. It was clearly due to the petitioner's own error in reading the plans if it figured that it would not have to disturb the old sewer at this point. It certainly cannot claim that the plans were inaccurate in this particular as they proved to be exactly correct when the petitioner came to construct the new sewer at that point. Petitioner's own engineer, Mr. Buck, testified that while it might be expected that the plans would show the outside of the existing sewer and not the inside, by scaling the plan you can see that the inside line of the old sewer was indicated. (Testimony, pp. 810, 811) Apparently Mr. Ciraci did this scaling with regard to the location of the bulkhead in this same existing sewer for which petitioner is now making claim for extra payment, because his claim is based partly at least on the fact that the plan (Ex. B) shows the bulkhead at a point where its construction was not satisfactory to stop the flow of sewage. The petitioner insists that it has a right to rely on the accuracy of the plans when it serves its purpose but refuses to allow the respondent to rely upon them when the result is unfavorable to the petitioner.

The claim presented by the petitioner on page 38 of Exhibit H is a joint claim and it is therefore impossible to determine which part of the claim applies to the plugging of the old sewer and which applies to breaking it out to remove it from the line of the new sewer. Moreover, the petitioner at no time indicated to the respondent that it expected to be paid as an

extra for either part of this work and the respondent contends that there was no reason why this should not have been handled as an extra by the petitioner if it expected to make such a claim.

CLAIM NO. 10. PRIVATE HOUSE SEWER ON DAY PROPERTY.

This claim appears to be based on the fact that although the petitioner diverted the flow from the existing sewer to the river before breaking out the existing sewer, which was at that point in the line of the new sewer, sewage continued to flow into the new construction work from some point to the south of the main sewer. The petitioner claims that it was necessary to pump this sewage for 25 working days before the source of the sewage was found and by-passed to the river. It admits that the cost of by-passing this sewage to the river was paid for by the respondent as an extra and the court's attention is called to Exhibit 6, which is a letter dated January 8, 1937, written by the manager of the Bureau of Public Works to the petitioner, covering this particular extra. The petitioner was ordered by force account to lay a 6" temporary drain from the Day property to the river. This order was given by its terms under paragraph D (1) of the contract (Ex. A) and was paid for upon completion as an extra. If the petitioner at that time claimed that it was not paid sufficiently for the work which it was required to do, respondent submits that it should have asked for additional compensation at that time and not have waited until December, 1938, to present such a claim. More than that, paragraph 29 on page 50 of the contract provides that "the flow of all sewers, drains, house connections and water courses met with shall be maintained and provided for by the Contractor, without damage or nuisance to other parties."

It would appear that the respondent was most liberal in paying the petitioner any part of the cost of by-passing this sewage, as it came from a house connection and was actually

covered by the terms of the contract. Certainly the petitioner should not be paid anything more for the work that it did in that connection.

CLAIM NO. 11. TEMPORARY LINE TO DIVERT SEWAGE TO RIVER.

This claim appears to be based on the petitioner's contention that the respondent would not allow it to make this diversion to the river in the most direct line but required it to carry the line down stream a considerable distance, involving the construction of 130′ more of drain than was reasonably necessary. Here again, reference is made to paragraph 28 on page 50 of the contract which requires the contractor to maintain the flow of all sewers and to place additional drains at any place where the engineers shall deem them to be necessary. Under the contract no direct payment is to be made for this work but compensation for the work and all expenses is to be considered as having been included in the prices stipulated for those particular items. Paragraph N (3) on page 28 of the contract also covers this point. As a matter of fact the petitioner did not build 130′ of temporary sewer at this point but less than 90′, and the respondent required it to by-pass the sewage farther down the river for the reason that the slope of the land at that point was more favorable. (Testimony, pp. 1088, 1089)

CLAIM NO. 12. TUNNEL UNDER TREES.

This claim is based on the petitioner's allegation that it was required to build a sheathed tunnel for a distance of 50′ underneath a large tree located on the Williams property near its southerly line and that the contract did not call for this work to be done. Paragraph 98 on page 76 of the contract was inserted to cover situations of this kind. It provides that "the Contractor shall take measures to protect trees from in-

jury by boxing in, by tying back branches, or by other means, and he shall tunnel or do the work by hand where necessary or where directed by the Engineer in order to avoid damage to the tree or roots." The petitioner attempts to avoid the application of this particular provision by referring to other parts of the contract specifications which it claims negative its application to this situation. It claims that it was required to build a sheathed tunnel and its claim is for payment, as stated in its proposal, for 51" pipe in tunnel, which is at the rate of $40 per running foot. In other words, the petitioner is claiming compensation for this small tunnel under some tree roots, whose sides were supported by timber sheeting, at the same rate that it was paid for liner plate tunnelling under the surface of Farmington Avenue from Station 49+89 to Station 50+84. It is also claiming for 50' of tunnel when the exact records of the respondent and the visual observation of respondent's inspector show that the tunnel was not over 12' in length and that the remainder of the work was done in open cut to the north and south of the tree. (Testimony, pp. 996-998; 1085-1088; 1022) Again, the respondent calls attention to the fact that no claim for extras was made in the day and time of this work and that the respondent had no knowledge that the petitioner would make any such claim until December 1938 when its first itemized claim was submitted.

CLAIM NO. 14. SPECIAL FOUNDATION SEAL.

This designation of the particular concrete work covered by this claim is the petitioner's own. (Testimony, p. 558) It does not appear as concrete foundation seal in the contract but is in fact foundation concrete. This foundation is provided for in paragraphs 16 and 17 on page 46 of the contract. No specific thickness of this foundation concrete is mentioned in these paragraphs, nor is any specific thickness mentioned on the contract plans (Ex. C) where under type B-1 and type B-2 appears the notation "Foundation concrete, as ordered

below this line." The arrow accompanying this notation points to the line upon which the sewer pipe rests. The notation to which the petitioner refers in Exhibit H on page 46 is that connected with the *concrete fill* as indicated on the same plan, where the label 6″ min. appears at the side of the section with an arrow pointing to the concrete above the foundation line. It is very evident that the petitioner is confusing the foundation concrete and the concrete fill. It appears to be another case where the contractor has incorrectly read the contract plans or is attempting to secure payment for an extra which it knows is not justified. The petitioner seeks to put its own interpretation on all the contract provisions whether they reasonably permit of such interpretation or not. Here again, the petitioner has exaggerated the distance of 2345′, as the respondent's record shows exactly 1122.5′ where as little foundation as 2″ was ordered.

CLAIM NO. 15. EXTRA COST BY REASON OF WINTER WORK.

The petitioner claims that not only was it put to additional expense in the actual work done under the various items claimed as extras but that by requiring such work to be done outside the provisions of the contract, the respondent delayed the completion of the contract beyond the time specified and that the petitioner was thereby put to considerable additional expense because of work during the winter season when the weather was unfavorable and when the labor was as a result not as efficient. (Record pp. 17, 18)

As having a direct and important bearing upon this claim, the respondent calls the court's attention to two letters which are in evidence as Exhibits U and V. They are both letters written by the petitioner to the respondent addressed to its manager, requesting an extension of time for completion of the contract. The first letter is dated August 12, 1937 when the contractor had been working for a little over one month. This letter requested a five weeks' extension of time, two

weeks of which was on account of the death of Mr. Roscoe N. Clark, a former manager of the Bureau of Public Works of the respondent, which resulted, according to the letter, in a delay in awarding the contract and the remaining three weeks of which was on account of the inability of the manufacturer of the reinforced concrete pipe used in the work to furnish the required size. The second letter, dated December 23, 1937, which was within a week of the date when the contract was supposed to be completed and approximately a week after December 15 when the petitioner claimed it expected to complete the contract, asked for an additional five weeks' extension, or ten weeks in all, because of the unfavorable weather during the preceding six months, especially during the summer, whereby the completion of the work had been hindered. It will be noted in connection with the various claims of the petitioner that both of these letters were written after many of the items of construction claimed by the petitioner as extras had been completed and which the petitioner now claims involved tremendous delay in the completion of the contract and yet there is not one word in either of these letters citing these various extras as the cause of any of the delay in the completion of the contract or as the basis of either of the requests of the petitioner for an extension of time. As shown by Exhibit 30, 278 feet of cradle north of No. 4 crossing was completed on July 16, 1937, and 130 feet south of the same crossing was completed on September 15, 1937. The northerly section of 242 feet of cradle on Judge Clark's property was completed during that same month. In October, 1937, the 198 foot section of cradle on the Seminary property was finished and the southerly cradle section of 92 feet on the Jacobus property was installed by December 17, 1937, which was several days before the letter of December 23, 1937 (Ex. V) was sent by Mr. Ciraci. Only the northerly section of 90 feet on the Jacobus property and the short southerly section of 60 feet on the Clark property remained to be done after the date of these letters. Out of approximately 1090 feet, around 940 feet had been completed before December 23, 1937, or more than 86% of the cradle work.

Surely, if the petitioner considered the various items of claim, and especially the cradle work, as being outside of the contract or as extras under it, it would not have failed to put them forward as cogent reasons for the substantial extension in time requested. As it had at that time, according to Mr. Ciraci's testimony, the promise of the respondent that it would be paid additional compensation for those items, it seems unbelievable that it would have failed to call them to the attention of the respondent in these letters. It seems all the more likely that this would have been done because the petitioner apparently had from the very beginning engaged local counsel to advise and direct it, as the contract was itself signed on behalf of the petitioner by one of its present counsel acting as attorney in fact (See Ex. A) and Mr. Ciraci testified that the letter of June 7, 1937, (Ex. 25) written by him to the respondent had been discussed with that same attorney before being signed by him and sent out. (Testimony, pp. 360, 361, 467)

It should be noted that the contract contains a definite provision as to how the contractor shall make claim for extension of time to complete the work where completion has been delayed by causes beyond its control. On page 24, Section I, paragraph (2) it is provided that "he shall be entitled to such reasonable extension of time for the completion of the work as may be decided upon by the Engineer, provided, however, that *no claim for an extension of time for any reason shall be allowed unless, within three (3) days after such delay occurs, notice in writing of the fact of said delay, its causes, and the extension claimed shall be given by the Contractor to the Engineer.*"

It is very evident that Mr. Ciraci was familiar with that paragraph and that he wrote the two letters on behalf of the petitioner in compliance with it. He now seeks to repudiate that provision of the contract also, as he has those provisions applicable to the petitioner's other claims. The contract is reasonable in this regard and the petitioner should be required to abide by it.

When Mr. Ciraci was confronted with these two letters

asking for an extension of time for the completion of the contract he lightly stated that he could still have completed the contract by December 15th in spite of the causes of delay mentioned in the letters, but that he simply wanted to be sure that he had leeway enough so he would not be penalized under the clause providing for liquidated damages. (Testimony, pp. 561, 562) Even at that time he had in mind that he would be subject to such damages. In the opinion of the respondent these letters and Mr. Ciraci's testimony with regard to them show very clearly that there was no misunderstanding on the part of the petitioner as to the character of the various parts of the construction work that it now claims for as extras, or as being entirely outside the original contract, and that they were not the cause of the delay in the completion of the contract. Surely, Mr. Ciraci would not have missed the opportunity of including in those two letters some mention at least of the items which he now claims caused so much delay in the completion of the work and for which he claims his company should be compensated by the payment of large extra sums. In fact, the petitioner's claim for extras is approximately 50% of the bid price and if Mr. Ciraci was so careful to go to his attorney before the contract was even awarded him so that he would not sign any letter which might commit him to anything unfavorable, he would not have failed to consult with this same attorney, who is one of petitioner's counsel in this case, to be sure that his claim for an extension of time was put in proper legal form, so that he could be assured of securing the necessary extension and would not be penalized for liquidated damages. He would then have been on solid ground in seeking such an extension.

One important reason for the failure of the petitioner to finish the work within the contract limit was its refusal to heed the advice of Mr. Brewer to do the work in the low parts in the river valley at the very beginning so that it would not be impeded by weather conditions. (Testimony, pp. 864, 868, 869, 933) Another reason for the delay may have been its failure to secure pipe promptly, but this was not chargeable to the respondent. (Testimony, pp. 370, 371)

CLAIM NO. 16. REFUND OF LIQUIDATED DAMAGES.

The respondent deducted the sum of $3540 from the amount computed to be due petitioner as liquidated damages for failing to complete the contract on December 31, 1937. The trial court held that the contract was substantially completed on March 31, 1938 instead of August 9, 1938 as claimed by the respondent (R. p. 44) and reduced the amount by $2200 for which it rendered judgment for the petitioner. The petitioner claims that no liquidated damages were justified as the delay was caused by extra work ordered by the respondent. The findings of fact made by the trial court negative that contention. (R. p. 46)

The petitioner claims that respondent introduced no evidence to show actual damages and that no actual damages appeared to have been suffered by it. Item 24 on page 17 of Exhibit A states that the entire work is to be completed on or before December 31, 1937, and in paragraph I (3) on page 25 of the contract it is provided that the contractor shall pay to the District the sum of $20 a day as liquidated damages for each day after said completion date that the work is not completed. The contractor was notified in paragraph 1 of the specifications on page 40 of the contract that this particular construction work was but a part of a large project and that the contractor must cooperate with other contractors on other parts of the work so as to secure the orderly and proper construction of the entire project. This contract was one of several, comprising an entire new intercepting sewer system for The Metropolitan District, which comprised the City of Hartford and the towns of Bloomfield, Newington, Wethersfield and Windsor. In such a contract as this it is impossible to determine what the damages may be as a result of failure of the contractor to complete his part of the work at the time specified. Such failure interferes with the operation of the system and may well delay other parts of the construction program. Under these circumstances it has been time and again held by numerous decisions that a liquidated damage provision of this sort is legal and enforcible provided it is

reasonable in amount. Certainly the sum of $20 a day for each actual working day is not excessive on a contract involving the expenditure of around $140,000 and the trial court has so found. (R. p. 43)

The following authorities are cited as typical of the court decisions upholding such a clause.

Williston on Contracts, Rev. Ed., Vol. 3, p. 2210, Sec. 785;
Wise *v.* United States, 249 U. S. 361, 365, 366;
Maryland Dredging Company *v.* United States, 241 U.S. 184;
Bankers' Surety Co. *v.* Elkhorn River Drainage Dist., 214 Fed. 342, 347;
Banta *v.* Stamford Motor Company, 89 Conn. 51.

The respondent had to keep inspectors on the work every day until it was completed and this was a definite extra expense to it until the workmen were off the job. (Testimony, p. 958)

The respondent did not waive its right to liquidate damages by permitting the petitioner to finish the work after the time fixed for completion even though it did not grant an extension of time. Such action is authorized by Section I, paragraph (3) on page 25 of the contract.

The petitioner lays stress on the failure of the respondent to counterclaim for the amount of the liquidated damages to which it claims to be entitled by reason of the delay in the completion of the contract by the date set by its terms and it contends that the respondent has thereby waived any claim to such damages. The respondent withheld the sum which it claimed to be reasonable under the liquidated damages clause of the contract and No. 13 (a) of the Rules of Civil Procedure is not applicable. Petitioner alleged in its complaint (Par. 27, R. p. 17) that the sum was wrongfully withheld and the respondent's answer denied it. The respondent is therefore not trying to put forth a set-off or counterclaim to any of the petitioner's claims but is denying the petitioner's right to recover.

PETITIONER'S CLAIM FOR EQUITABLE CONSIDERATION ON QUANTUM MERUIT

The petitioner introduced evidence for the purpose of showing that it had expended more money in the completion of the contract that it was entitled to receive under its bid. It claims that the respondent was therefore unjustly enriched because it had received a completed job that was worth more than the price paid for it and cites numerous cases in an attempt to support its position. The trial court considered this phase of the case and arrived at a conclusion adverse to the petitioner (R. p. 41), as it found the figures of cost to the petitioner unsatisfactory because of its incomplete accounting records.

It does not follow that the respondent should be required to pay the total amount of the petitioner's cost simply because it is in excess of the amount which the petitioner was entitled to receive under its bid. The petitioner, in effect, asks the court to disregard the contract price as fixed by its own bid price on the various items in the proposal and to substitute a cost plus contract under which it would receive approximately 50% more. This the trial court refused to do, largely because it did not credit the testimony of the petitioner's witnesses. Having found the facts in regard to various items of claim in favor of the respondent and that all work done was covered by the original contract and having found that no basis for equitable relief to the petitioner existed it was logical that the trial court should have refused additional compensation for the work.

The petitioner contends that the trial court failed to make findings on important points raised in connection with certain of its claims. An examination of the findings of fact made by the trial court (R. pp. 45-46) will show that in addition to the detailed findings of fact made on each of the various claims of the petitioner, it definitely found paragraphs 7 to 26, inclusive, and paragraphs 28 to 37, inclusive, of the petitioner's complaint not proven. The trial court therefore found the facts with regard to each of the petitioner's claims against it. The petitioner

refuses to recognize these findings although they are within the province of the trial court and adequately supported by the evidence introduced.

The respondent submits that the finding of facts made by the trial court is decisive of this case.

> Alabama Power Co. *v.* Ickes, 302 U. S. 464, 477.
> General Talking Pictures Corp., *v.* Western Electric Co., 304 U. S. 175, 178.
> Dooley *v.* Pease, 180 U. S. 126, 131;
> Pressed Steel Car Co. *v.* Union Pacific R. R. Co. (C. C. A. 2d Circ.) 297 Fed. 788, 790;
> Gould Securities Co. *v.* U. S. (C. C. A. 2d Circ.) 96 Fed. (2d) 780, 781;
> Federal Rules of Civil Procedure, No. 52, 28 U. S. C. A., page 677.

The petitioner was fully informed as to the character of the work and the surrounding conditions not only by the provisions and specifications of the contract but by the additional information contained in a letter written by Mr. Brewer, the engineer in charge, to his superior, the manager of the respondent's Bureau of Public Works. A copy of this letter dated June 3, 1937 (Ex. 22) was shown to Mr. Ciraci (Testimony, p. 350) and by him taken up with his attorney who appears of counsel in this case. (Testimony, p. 467) This letter expressed the writer's concern that the petitioner had misjudged the conditions under which the contract was to be performed because some of its bid figures were so low. The petitioner replied to this letter on June 7, 1937 (Ex. 25) stating that the bid was made with full knowledge of the circumstances and asserting its willingness to do the work for the prices submitted. The contract had not been awarded at that time and the petitioner could have withdrawn. It chose not to.

It sought to justify its action by claiming that in the case of certain items specifically mentioned in the letter (Ex. 22) it received more under its method of bidding than it would have received by submitting a balanced bid. But Mr. Brewer's letter called attention to many of the conditions affecting the work which apparently went unheeded and the lack of attention to which on the part of petitioner resulted in many of the

difficulties which it encountered in the prosecution of the work with the attendant additional expense to it. It now seeks to have the respondent reimburse it for this expense.

For instance, among the items mentioned in the letter are items 7 and 8 of the proposal (Ex. A, pp. 14 and 15) which cover foundation concrete Class A and Class B required in the construction of the cradle. This comprises one of the largest of petitioner's claims. Both of these items cover foundation concrete *in place* and therefore involve labor costs and are definitely the basis of claims 1 and 15. Petitioner's Exhibit PP contains no answer to the objections raised by Mr. Brewer's letter, for the unit prices shown in the so-called balanced bid are still much lower than the average figures given in the letter and Mr. Brewer lays particular stress on those items.

The petitioner entirely misconceives the comments of the trial court with regard to Exhibit 22. The court clearly felt that after such a warning the difficulties in which the petitioner found itself during the construction work under the contract were of its own making. This was one of many circumstances surrounding the performance of the contract which the trial court had the right to take into consideration in arriving at its decision that any added expense which the petitioner may have incurred in the work done under the contract was not due to any act of the respondent.

The petitioner contends that the trial court was in error in its construction of the provisions of the contract (Ex. A, p. 21, par. C) making the engineer the judge as to the meaning, intent and performance of the contract. The cases universally hold that this is a valid and enforceable provision so long as the engineer acts in good faith and does not abuse his power.

Ripley *v.* United States, 223 U. S. 695, 704;
Beattie *v.* McMullen, 82 Conn. 484;
Cranford *v.* City of New York, (C. C. A. 2) 38 Fed. (2d) 52, 54;
54 A. L. R. Ann. pp. 1255 ff.

The trial court has found as a fact that the respondent's engineer did act in good faith and that his decisions were binding upon the petitioner. Moreover, the findings of fact show

that in no instance did the petitioner question any decision of the respondent's engineer at the time it was made and the order given. It did claim that the engineer waived the testing of some of the river crossings but the trial court found that the engineer did not in any instance do so. This finding of fact cannot be questioned by the petitioner as it was made upon conflicting evidence and the trial court was the judge of the credibility of the witnesses.

The petitioner charges the respondent's engineer with fraud and concealment of information, although the trial court definitely found to the contrary. It seems to the respondent that any fraud in the case was on the part of the petitioner. No notice of any kind was given to the respondent that claims were to be made for extras and, what is even more amazing, definite requests for extensions of time were made *under the provisions of the contract* and based on entirely different grounds from those now put forward. After the contract is substantially completed the respondent receives a letter from the petitioner's attorney which is merely a notice of a claim to come and is not followed by a detailed claim until *ten months later.* And the petitioner now asks the court to accept, not the figures contained in the claim then submitted (Ex. 13), but figures totalling a much larger amount as expressly prepared for purposes of this action. (Ex. H)

CONCLUSION

The respondent contends that all of the work done by the petitioner was covered by the provisions of the contract; that it is not entitled to extra compensation, either under the contract or outside the contract, under any of the theories put forth by it; that the findings of the trial court, which are adverse to the petitioner and which were accepted by the Circuit Court of Appeals, are fully supported by the evidence; that there are no questions of law raised by the petitioner which have not already been decided by this honorable court; that the decision sought to be reviewed is not in conflict with the decisions of this

honorable court, with those of the Connecticut courts or with the weight of authority of the applicable decisions of other state and federal courts. The respondent therefore submits that the petitioner has failed to show any grounds for the issuance of a writ of certiorari and that the petition should be denied.

Respectfully submitted,

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